STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2003
v	No. 233161 Oakland Circuit Court
RICHARD LEE COLLAR, Defendant-Appellant.	LC No. 00-173369-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 233176 Oakland Circuit Court
DANIEL BARRY COUCH, Defendant-Appellant.	

Before: Talbot, P.J. and Neff and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, defendants Richard Lee Collar (Collar) and Daniel Barry Couch (Couch) appeal as of right their jury trial conviction of second-degree murder, MCL 750.317, in connection with the beating to death of Lawrence Jack Thompson. Defendants were sentenced to a term of nineteen to forty years' imprisonment. We affirm.

I. Basic Facts

This case arises from an incident that occurred when a party went awry. After decedent consumed an "extremely large" line of cocaine along with a second one, he began to behave in a bizarre and unpleasant fashion. Ultimately, the decedent was found having what appeared to be forced anal intercourse with a woman. Collar pulled the decedent from the woman. The defendants and some other men then dragged the decedent outside where the defendants took part in an extensive beating of the decedent, who did not defend himself. The decedent died as a result of the beating.

II. Docket No. 233161

A. Collar's Statements

Collar argues that his statements to the police were improperly introduced at trial because they were made without the benefit of *Miranda*[1] warnings. Because Collar did not challenge his statements in the trial court, we review this unpreserved issue for plain error affecting Collar's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although Collar asserts that *Miranda* warnings should have been given because he was the focus of the investigation at the time the statements were made, he also acknowledges that the "focus" test is not used in Michigan. *People v Hill*, 429 Mich 382, 399; 415 NW2d 193 (1987). Rather, *Miranda* warnings are required only in situations involving a custodial interrogation, which means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Coomer*, 245 Mich App 206, 218-219; 627 NW2d 612 (2001). Here, Collar began talking to the police as soon as they arrived at the scene, before they had an opportunity to investigate what happened. Collar volunteered the statement before he was taken into custody. After Collar was taken into custody, he continued to talk, even though he was not questioned. Because these statements were volunteered, and not the result of police interrogation, their use at trial was not plain error.

B. Ineffective Assistance of Counsel

Collar also argues that trial counsel was ineffective. Because Collar did not raise this issue in a motion for a new trial or a *Ginther*[2] hearing in the trial court, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on Collar to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance deprived Collar of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

First, Collar argues that counsel was ineffective for failing to move for a *Walker*[3] hearing to challenge his pre-*Miranda* statements to the police. As discussed *supra*, the record discloses that the challenged statements were either volunteered or made before Collar was taken into custody. Because the record does not disclose a basis for excluding the statements under *Miranda*, a motion to suppress the statements would have been futile. Counsel is not required to make futile motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Collar also argues that counsel was ineffective for failing to request a lesser offense instruction on assault with intent to do great bodily harm. Because assault with intent to do great

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

bodily harm is a cognate lesser offense of second-degree murder, *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996), an instruction on that offense would no longer be permitted under our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335, 354-357; 646 NW2d 127 (2002) (holding that MCL 768.32 only permits instruction on necessarily included lesser offenses, not cognate lesser offenses). In any event, the decision whether to request a lesser offense instruction was a matter of trial strategy, and Collar has not overcome the presumption of sound strategy. *Avant*, *supra*.

Finally, Collar argues that counsel was ineffective for failing to request an independent medical examination of the decedent regarding other contributory causes of the decedent's death. This claim is not supported by the record. Contrary to what Collar argues, the record discloses that defense counsel did, in fact, request and was granted authority to hire an independent medical examiner, and that an independent medical examination was conducted by Werner Spitz, M.D.

C. Sufficiency of the Evidence

Lastly, Collar argues that the evidence was insufficient to support his conviction for second-degree murder. This Court reviews a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witness. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). It is for the trier of fact, not this Court, to determine what inferences can be fairly drawn from the evidence and the weight accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise therefrom can constitute satisfactory proof of the elements of the crime. *Carines*, *supra* at 757. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In this case, there was sufficient evidence to support the jury verdict. Testimony was presented that, even before the decedent perpetrated the alleged sexual assault, Collar stated he was going to "kick Jack's a--." According to eyewitnesses, Collar "repeatedly" punched the decedent in the face with his fist "several, several times" and witnesses heard Collar say that he wanted to kill the decedent, who was not fighting back. Although the witnesses did not agree about who placed every hit and kick, there was testimony that Collar repeatedly hit and kicked the decedent in the face, and the decedent's blood was found on Collar's pants and shoes. While there were other contributory causes to the decedent's death, the pathologist, Ljubisa Dragovic, M.D. testified that "the triggering and the proximal cause [of death] is the beating, the blunt trauma that [the decedent] sustained in the beating." Dragovic testified that the decedent would not have died at this time, but for the beating. Viewing this evidence in a light most favorable to the prosecution, and making all reasonable inferences in support of the jury verdict, a rational trier of fact could have found that the essential elements of second-degree murder were proven beyond a reasonable doubt.

III. Docket No. 233176

A. Motion to Adjourn

Couch argues that the trial court abused its discretion by denying his motion to adjourn trial so that he could retain new counsel. We disagree. We review the trial court's decision in this regard for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002).

Couch's request for an adjournment was made on the day of trial. As the trial court observed, trial had previously been adjourned more than two months earlier and Couch had been given an "extraordinary" amount of time to prepare for trial. Additionally, Couch had been out on bond and, therefore, had ample opportunity to arrange for new counsel. Couch failed to offer a bona fide reason for his untimely request for an adjournment. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999). Further, Couch did not voice any complaints about appointed counsel's performance, nor does the record disclose that there was any dispute between Couch and appointed counsel. *Id.* Unlike the situation in *People v Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972), defense counsel here was ready to proceed with trial and did not ask to withdraw. The trial court did not abuse its discretion in denying Couch's motion for an adjournment.

B. Prosecutorial Misconduct

Couch also contends that he was denied a fair trial because of prosecutorial misconduct. Specifically, he asserts that the prosecutor failed to disclose information to defense counsel and the medical examiner that would have shown that the decedent did not die from a beating. Because this issue was not raised below, Couch must show a plain error affecting his substantial rights. *Carines, supra*.

A prosecutor has a duty to disclose favorable evidence to the defendant and to correct false evidence when it appears. *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). Here, however, the record does not support Couch's claim that the prosecutor withheld any official records from either defense counsel or Dragovic. Contrary to what Couch asserts on appeal, trial counsel did not testify that certain reports were not provided to him in discovery. Rather, the record indicates that it was Couch who stated that he believed a report was kept from him. Dragovic, when asked whether he received the report at issue, replied, "That is not how it works, you see." Because it is not apparent from the record that any reports were improperly withheld, Couch has not established plain error.

C. Photograph

Next, Couch argues that the trial court abused its discretion in admitting a photograph of the decedent's beaten face. A photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). Witnesses testified that the photograph fairly and accurately depicted the decedent as he appeared after the beating. Because, the photograph was probative of the severity and vastness of the decedent's injuries, and was relevant to a determination of intent, we find no abuse of discretion.

D. Sufficiency of the Evidence

Next, Couch argues that the evidence was insufficient to convict him of second-degree murder. We disagree. It is undisputed that Couch helped drag the decedent out of the apartment. According to some witnesses, there was "no doubt" that Couch kicked the decedent "hard enough to move his body," that Couch kicked the decedent a couple of times in the head and chest, and that Couch hit the decedent as he was laying on his back on the grass, trying to get up. The decedent did not fight back. Although one witness said that Couch left the scene, the witness also testified that he lost track of both Couch and Collar for a time. The parties stipulated that the decedent's blood was on Couch's shirt and jeans. Regarding the cause of the decedent's death, Dragovic testified that the decedent would not have died, but for the beating.

Viewing the evidence in a light most favorable to the prosecution, and making all reasonable inferences and credibility choices in support of the jury's verdict, a rational trier of fact could have found that the essential elements of second-degree murder were proven beyond a reasonable doubt.

E. Ineffective Assistance of Counsel

Couch also argues that trial counsel was ineffective. Following a *Ginther* hearing, the trial court found that trial counsel was not ineffective. We agree.

Couch argues that trial counsel was ineffective for failing to challenge the identification testimony at trial and argue that there was a third unidentified assailant. Contrary to Couch's claim, no eyewitness specifically testified that Couch was not one of the assailants. Defense counsel argued to the jury that there were inconsistencies in the witnesses' descriptions of the assailants, and suggested that the physical descriptions did not fit Couch. If defense counsel had chosen to directly question Couch's identification, he would have run the risk that the jury would have been told unequivocally that Couch was the second assailant, a result that was almost assured in light of other witnesses' positive identification of Couch as one of the assailants and the presence of the decedent's blood on Couch's clothing. Couch has not overcome the presumption of sound trial strategy. *Avant, supra.*

Couch also argues that trial counsel was ineffective for failing to investigate the possibility of a restraint-related asphyxia defense in light of evidence that EMS technicians had restrained the decedent. Trial counsel testified at the *Ginther* hearing that he obtained an independent medical examination of the decedent to evaluate the cause of death. Trial counsel was aware of information that the decedent had been restrained, but made the strategic decision not to focus on that aspect for fear that it would emphasize the decedent's fear and the effect of the attack. Although Couch presented an EMS technician at the *Ginther* hearing who opined that restraining a patient on his stomach can inhibit his ability to breathe, Dragovic testified that it would have been preferable in this case to transport the decedent "face down," to prevent him from inhaling blood. Dragovic also testified that the decedent became unconscious because of blood in his air sacs, not because he was restrained, and that the beating was the proximate cause of his death. We will not second-guess trial counsel's strategic decisions. *Avant, supra.* Because trial counsel deliberately decided not to pursue a restraint-related asphyxia theory as a matter of trial strategy, and because the evidence failed to show a reasonable probability that

such a theory would have been successful in any event, we reject Couch's claim that trial counsel was ineffective in this regard.

Couch also argues that trial counsel was ineffective because he failed to present a viable defense. We disagree. Defense counsel attempted to show that Couch, a stranger to the decedent, left the scene before the decedent was seriously injured and, therefore, was not responsible for the decedent's death, a theory that found support in the testimony of Couch's friends. Defense counsel also argued that Couch did not meet the description of either man who kicked the decedent. If believed, this defense could have led to Couch's acquittal. We will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *Avant, supra*. Defendant Couch has not met his burden of showing that trial counsel's performance was either unreasonable or prejudicial.

Finally, Couch argues that he was denied the effective assistance of appellate counsel because his original appellate attorney failed to raise important issues. A claim of ineffective assistance of appellate counsel is governed by the same standards for evaluating the effective assistance of trial counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). An appellate attorney is not required to raise every conceivable issue. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). Here, even if Couch's original appellate attorney failed to raise a meritorious issue, Couch cannot establish the requisite prejudice. On Couch's motion, this Court struck Couch's original appeal brief and allowed Couch to submit a new brief prepared by newly retained counsel. Because Couch has not been precluded from raising additional issues that he believes should be raised, his ineffective assistance of appellate counsel claim must fail.

Affirmed

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly